



Commonwealth of Massachusetts State Ethics Commission

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CONFLICT OF INTEREST OPINION EC-COI-99-3

FACTS:

You are the Chief of the Fire Department in a town in Massachusetts ("Town"). You have inquired on behalf of and with the permission of two firefighters in Town regarding the application of G.L. c. 268A, § 17, as recently amended by St. 1998, c. 100, to private work which each firefighter wishes to do "on the side."

"Firefighter A"

Firefighter A is a call firefighter^{1/} with the Town Fire Department. He serves as a call firefighter fewer than sixty days per year. Call firefighters in the Town have not been designated as "special municipal employees"^{2/} Firefighter A is a registered Professional Engineer (PE) in Massachusetts. In addition to being a call firefighter, he is self-employed as a consulting engineer. Among the work he performs for clients is the design of fire protection systems.^{3/} For example, an architect or contractor who is constructing or renovating a building might contract with him to do the design and drawings for the building's fire suppression system. As the consulting engineer on such a project, he does not personally apply for any permits. However, his design work is part of the materials submitted (whether by the contractor, architect or owner) to the local Building Department for a building permit.^{4/} Pursuant to 780 CMR § 903.2, the Building Department submits the plans to the Fire Department and the Fire Department must approve the plans before the Building Department may issue a permit.^{5/} After construction, a Certificate of Occupancy may not be issued until the Professional Engineer responsible for designing the system certifies that the fire protection systems have been installed in accordance with the approved design.^{6/} Firefighter A wishes to design fire protection systems for construction within the Town.

"Firefighter B"

Firefighter B is a full-time firefighter employed by the Town. Firefighter B also has a license to perform plumbing and heating work, which he does during his own time.

Recently, Firefighter B has received requests to replace boilers. To expand his business, he enrolled in a class on oil burner installation and, upon completion of that class, passed the Massachusetts Department of Safety's test to be licensed to perform such work. As a result, he is now licensed to perform oil burner work. See G.L. c. 148, § 10D.

Installation or alteration of fuel oil burning equipment requires a permit issued by the local Fire Department. 527 CMR § 4.00. As a firefighter, Firefighter B is not involved in inspecting oil burners. Most of his oil burner work would be in private residences in the Town.

QUESTIONS:

1. As a Town call firefighter, and a regular municipal employee, may Firefighter A design for compensation fire protections systems for installation in the Town?

2. As a Town full-time firefighter, may Firefighter B perform oil burner work in the Town which requires permits issued by the Town Fire Department?

ANSWERS:

1. No, because in doing so Firefighter A would be receiving compensation from someone other than the Town in relation to a particular matter (the building per-*mit* for construction of the fire protection system) in which the Town is a party or has a direct and substantial interest, in violation of G.L. c. 268A, § 17(a). The most recent amendment to § 17 does not alter this result. A reading of § 17 which allowed co-workers of Firefighter A to approve or disapprove his fire protection drawings would undermine the clear statutory purpose of the amendment.

2. No, because in doing so Firefighter B would be receiving compensation from, and acting as agent for, someone other than the Town in relation to a particular matter (the permit for the oil burner work) in which the Town is a party or has a direct and substantial interest, in violation of G.L. c. 268A, § 17(a) and (c). The most recent amendment to § 17 does not alter this result, because that amendment does not apply to employees seeking permits from the agency by which they are employed.

DISCUSSION:

“Firefighter A”

Section 17(a) prohibits a municipal employee from receiving compensation^{2/} from anyone, other than the municipality, in relation to a particular matter^{3/} in which the municipality is a party or has a direct and substantial interest. In addition, § 17(c) prohibits a municipal employee from acting as agent^{4/} or attorney for anyone other than the municipality in any claim against the municipality or for anyone in connection with any particular matter in which the municipality has a direct and substantial interest. In general, any “particular matter” that involves municipal action, such as a permit granted by a municipality, is considered to be of direct and substantial interest to the municipality. *Commonwealth v. Canon*, 373 Mass. 494, 498 (1977); *EC-COI-88-21*. Section 17 is based on the principle that “one cannot serve two masters.” These provisions, which prohibit municipal employees from providing assistance to private parties regarding matters of direct and substantial interest to the municipality, have been called “the essence of conflict-of-interest legislation.” W. G. Buss, *The Massachusetts Conflict of Interest Law: An Analysis*, B. U. Law Rev. 299, 322 (1965).

A significant amendment to § 17 was recently enacted which affects the type of private work some municipal employees may do “on the side.” In 1998, the Legislature added the following provision to § 17:

This section shall not prevent a municipal employee from applying on behalf of anyone for a building, electrical, wiring, plumbing, gas fitting or septic system permit, nor from receiving compensation in relation to any such permit, unless such employee is employed by or provides services to the permit-granting agency or an agency that regulates the activities of the permit-granting agency.

G. L. c. 268A, § 17 as amended by St. 1998, c. 100 (H. 5102)
(effective May 1, 1998)

This exemption allows a municipal employee to apply for and, more significantly in the case of Firefighter A, to receive compensation in connection with a permit, so long as the employee is not employed by the permit-granting agency or an agency that regulates the activities of the permit-granting agency.

As an initial matter, we believe that Firefighter A, by designing for compensation fire protection systems to be installed in the Town, is receiving compensation “in relation to” the building permit. Although, Firefighter A does not personally apply for the permit or install the system, his design work is undertaken with the knowledge that it will be submitted to the Town as a necessary part of the permit application. See, 780 CMR § 903.1.3. He is further aware that his designs must comply with applicable code requirements and be approved by the Fire Department. In essence, his work is a necessary part of the permit application and would likely not exist apart from it. We therefore conclude that his design work is “in relation to” the building permit.

We must next consider the questions of whether Firefighter A is employed by the permit-granting agency or an agency which regulates the activities of the permit-granting agency. Read literally, the phrase “permit-granting agency” would, on these facts, appear to refer to the Building Department. However, an absolute prerequisite for the issuance of the permit by the Building Department is the Fire Department’s “review and approval” of the fire protection design documents. 780 CMR § 903.2. Although the Fire Department may not be the permit-granting agency, its approval is legally necessary in order for the Building Department to issue the permit. Because the Fire Department shares with the Building Department approval power for the type of building permit at issue here, the Fire Department may properly be considered, on these facts, the functional equivalent of a permit-granting agency.^{10/} As explained below, we therefore conclude that because Firefighter A is employed by the Fire Department, he may not design for compensation fire protection systems for installation in the Town.

We believe that this view is consonant with the underlying purposes of the recent amendment to § 17. The amendment was intended to moderate some of the harsh results of the application of §§ 17(a) and (c) to municipal employees. For example, prior to the amendment, a firefighter “moonlighting” as a carpenter could not apply for a building permit from the Building Department to build a deck for a Town resident. By applying for such a permit, the firefighter would have been “acting as agent” for someone other than the Town in a matter of direct and substantial interest to the Town, in violation of § 17(c). See, *EC-COI-88-9*.

The amendment altered this state of affairs by allowing a municipal employee to apply for a permit, or be paid in relation to one, so long as the employee’s own agency is not the agency which issues the permit, and is not an agency which regulates the activities of the permit-issuing agency. This serves to prevent the conflict of interest which would arise if, for example, an employee’s permit application were to be reviewed by a co-worker, subordinate or superior in his own agency. That is in all essential respects the case here. Because the Fire Department’s approval is required for any building permit involving a fire control system, Fire Department colleagues of Firefighter A would necessarily review and approve (or disapprove) his designs. We believe that this is just the type of conflict which § 17, including the amendment, seeks to prevent.

We are mindful of the argument that because Firefighter A is not employed by the “permit-granting agency”, i.e., the Building Department, he should be able to avail himself of the exemption in the recent amendment to § 17. “Ordinarily, if the language of the statute is plain

and unambiguous it is conclusive as to legislative intent.” *Sterilite Corporation v. Continental Casualty Co.*, 397 Mass. 837, 839. Statutory interpretation also requires, however, a consideration of such factors as “the evil or mischief toward which the statute was apparently directed”, *Meunier’s Case*, 319 Mass. 421, 423 (1946); the underlying purpose of the legislation, in that “the purpose and not the letter of the statute controls”, *Walsh v. Ogorzalek*, 372 Mass. 271, 274 (1977); and the “fair import” of the statute, *Thatcher v. Secretary of Commonwealth*, 250 Mass. 188, 191 (1924). As the *Sterilite* court opined, “time and again we have stated that we should not accept the literal meaning of the words of a statute without regard for that statute’s purpose and history.” *Sterilite*, *supra*, at 839.

A consideration of the totality of the circumstances in this matter, including the fact that the Fire Department’s approval of Firefighter A’s design work is a legal prerequisite to the approval of the building permit, leads us to conclude that the legislature did not intend to allow a municipal employee to do outside work which would be reviewed by his own agency simply because that agency’s name does not appear at the top of the permit to be granted. Therefore, we conclude that the amendment does not, on these facts, exempt a municipal employee from the application of §§ 17 (a) and (c). Accordingly, Firefighter A may not receive compensation for the design of a fire safety system to be installed in the Town, where such installation is subject to a building permit which must be approved by the Fire Department based on its review of the design plans.^{11/} As discussed below, to the extent that §§ 17 (a) and (c) may create difficulties for a town attempting to attract and retain call firefighters, such difficulties may be eliminated or ameliorated by the Board of Selectmen designating call firefighters as special municipal employees.

Analysis If Call Firefighters Are Designated as “Special Municipal Employees”

The position of call firefighter is not currently designated as a “special municipal employee”^{12/} in the Town, although it appears that the position is likely eligible to be so designated by the Board of Selectmen. We will, therefore, discuss the issues raised as they would apply to Firefighter A if he became a special municipal employee.

In general, a special municipal employee is an employee who “occupies a position for which no compensation is provided or which, by its classification in the municipal agency involved or by the terms of the contract or conditions of employment, permits personal or private employment during normal working hours, or unless he in fact does not earn compensation as a municipal employee for an aggregate of more than eight hundred hours during the preceding three hundred and sixty-five days” and whose position has been officially designated by the Board of Selectmen as that of “special municipal employee.” G.L. c. 268A, § 1(n).

The conflict of interest statute establishes exemptions or other provisions applicable only to special municipal employees (or to special state or special county employees.) Such an exemption exists in § 17:

“A special municipal employee shall be subject to paragraphs (a) and (c) only in relation to a particular matter (a) in which he has at any time participated as a municipal employee, or (b) which is or within one year has been a subject of his official responsibility, or (c) which is pending in the municipal agency in which he is serving. Clause (c) of the preceding sentence shall not apply in the case of a special municipal employee who serves on no more than sixty days during any period of three hundred and sixty-five consecutive days.”

This exemption thus provides that a special municipal employee may, notwithstanding §§ 17(a) and (c), receive compensation from someone other than the municipality, or act as agent for someone other than the municipality, in matters in which the municipality is a party or has a direct and substantial interest, *if* certain conditions are met. In the case of Firefighter A, clause (c) of the exemption is the relevant condition which must be met.^{13/} That clause states that §§ 17(a) and (c) still apply to a special municipal employee regarding a particular matter pending in employee's own municipal agency, unless that special municipal employee serves sixty or fewer days in any one year period. Because permits which are issued by or require the approval of the Fire Department are "pending in the municipal agency" in which a firefighter is serving, a firefighter who is a special municipal employee would not be permitted to receive compensation in connection with such a permit, or act as agent in connection with such a permit, *unless* the firefighter serves "on no more than sixty days during any period of three hundred and sixty-five days."

Firefighter A states that he works significantly fewer than 60 days per year as a call firefighter. Therefore, if call firefighters become classified by the Board of Selectmen as special municipal employees of the Town, he may work in his private capacity as an engineer on matters requiring a permit from (or a permit sign-off from) the Town Fire Department, so long as he continues to work as a call firefighter on no more than 60 days in any 365 day period, and he does not as a municipal employee participate in or have official responsibility for the particular matter of the permit or permit sign-off.

"Firefighter B"

As a full-time firefighter, Firefighter B is a municipal employee^{14/} subject to the conflict of interest law. As described in detail below, the oil burner work he seeks to do within the Town will be prohibited under § 17 of G. L. c. 268A.

The same general principles discussed above regarding Section 17 apply to Firefighter B. A permit the Fire Department issues for oil burner work is a particular matter of direct and substantial interest to the Town. *Commonwealth v. Canon*, 373 Mass. 494, 498 (1977); *EC-COI-88-21*.

The recent amendment to § 17, discussed above, affects the types of private work Firefighter B might do "on the side" but does not allow him to pull permits from his own agency, the Fire Department. Although there may be some question as to whether an oil burner installation permit falls into any of the categories of permits listed in the amendment (i.e., "building, electrical, wiring, plumbing, gas fitting, or septic system"), it is not necessary to reach that issue. This is so because even if an oil burner permit were to be considered, for example, a building, electrical or wiring permit, this exemption expressly prohibits an employee from receiving compensation in relation to permits his own agency issues. Therefore, in any event, this exemption does not apply to Firefighter B because the permit for oil burner installation is issued by his employer, the Fire Department. Thus, the portions of the conflict statute applicable to these facts are §§ 17(a) and (c). Those sections prohibit Firefighter B from performing oil burner installation work in the Town because he would be receiving compensation and/or acting as agent in relation to a particular matter (the permit) in which the Town is a party or has a direct and substantial interest.

Please note that the recently-enacted exemption set forth above expressly allows Firefighter B to pull other permits, for example, plumbing or gas fitting permits, as long as the

permit-granting agency is *not* the Fire Department.^{15/} In addition, § 17 does not apply to Firefighter B pulling permits in towns other than the Town because such permits would not be “particular matters” of “direct and substantial interest” to the Town.

Date Authorized: March 10, 1999

^{1/}Call firefighters are called to work for a particular incident, as required. They are paid an hourly rate for the actual time worked.

^{2/}“Special municipal employee” is defined as “ a municipal employee who is not a mayor, a member of the board of aldermen, a member of a city council, or a selectman in a town with a population in excess of ten thousand persons and whose position has been expressly classified by the city council, or board of aldermen if there is no city council, or board of selectmen, as that of a special employee under the terms and provisions of this chapter; provided, however, that a selectman in a town with a population of ten thousand or fewer persons shall be a special municipal employee without being expressly so classified. All employees who hold equivalent offices, positions, employment or membership in the same municipal agency shall have the same classification; provided, however, no municipal employee shall be classified as a “special municipal employee” unless he occupies a position for which no compensation is provided or which, by its classification in the municipal agency involved or by the terms of the contract or conditions of employment, permits personal or private employment during normal working hours, or unless he in fact does not earn compensation as a municipal employee for an aggregate of more than eight hundred hours during the preceding three hundred and sixty-five days. For this purpose compensation by the day shall be considered as equivalent to compensation for seven hours per day. A special municipal employee shall be in such status on days for which he is not compensated as well as on days on which he earns compensation. All employees of any city or town wherein no such classification has been made shall be deemed to be “municipal employees” and shall be subject to all the provisions of this chapter with respect thereto without exception.” G.L. c. 268A,

^{3/}“Fire protection system” is defined as “[d]evices equipment and systems used to detect a fire, activate an alarm, suppress or control a fire, or any combination thereof.” 780 CMR § 902.1. In general, all fire protection systems must be designed by a registered professional engineer and bear the engineer’s original stamp and signature. 780 CMR § 903.1.3

^{4/}The engineer “shall be responsible for the review and certify that all shop drawings conform to the approved fire protection construction documents as submitted for the building permit and approved by the building official.” 780 CMR § 903.1.3

^{5/} “ . . . the building official shall transmit one set of the fire protection construction documents and building construction documents to the head of the fire department or his designee for review and approval . . . ” 780 CMR § 903.2.

^{6/}The certification must state that “the fire protection systems have been installed in accordance with the approved fire protection construction documents and that he has reviewed the shop drawings for conformance to [the applicable regulations] and has identified deviations if any . . . ” 780 CMR § 903.4.

^{7/}“Compensation, any money, thing of value or economic benefit conferred on or received by any person in return for service rendered or to be rendered by himself or another.” G.L. c. 268A, § 1(a).

^{8/}“Particular matter” is defined as any judicial or other proceeding, application, submission, request for a ruling or other determination, contract, claim, controversy, charge, accusation, arrest, decision, determination, finding, but excluding enactment of general legislation by the general court and petitions of cities, towns, counties and districts for special laws related to their governmental organizations, powers, duties, finances and property.” G.L. c. 268A, § 1(k).

^{9/}The State Ethics Commission has concluded that “the distinguishing factor of acting as agent within the meaning of the conflict law is ‘acting on behalf of’ some person or entity, a factor present in acting as spokesperson, negotiating, signing documents and submitting applications.” *In re Sullivan*, 1987 SEC 312, 314-315; See also, *In re Reynolds*, 1989 SEC 423,427; *Commonwealth v. Newman*, 32 Mass. App. Ct. 148, 150 (1992).

^{10/}In addition, although the Fire Department’s approval is required in order for the Building Department to issue a building permit under these circumstances, we do not believe that the Fire Department therefore “regulates” the Building Department within the meaning of the statute. The word “regulate” is not defined in G.L. c. 268A. We have said that “regulate” means to govern or direct according to rule or bring under the control of constituted authority, to limit and prohibit, to arrange in proper order, and to control that which already exists.” *EC-COI-83-158* (from *Black’s*

Law Dictionary, 5th ed. West, 1979); *EC-COI-91-9*. The issue here is whether the necessity of the Fire Department sign-off on the building permit for a fire protection system is sufficient to deem the Building Department "regulated" by the Fire Department. We have distinguished "those . . . agency relationships which have an indirect, incidental effect on the . . . agency's activities from those relationships where one agency has determinate or regulatory authority over the other." *EC-COI-85-80*. We conclude that the facts before us do not present a situation in which the Fire Department has "regulatory authority" over the Building Department.

¹¹He is free to design for compensation fire protection systems for installation in towns other than the town in which he is a firefighter.

¹²See definition in footnote 2, above.

¹³Clauses (a) and (b) of the exemption concern municipal employees who in their official capacities either participate in or have official responsibility for a particular matter. Since Firefighter A does not participate in or have official responsibility for the Fire Department's review of his own private design drawings, these provisions are inapplicable to him.

¹⁴"Municipal employee, a person performing services for or holding an office, position, employment or membership in a municipal agency, whether by election, appointment, contract of hire or engagement, whether serving with or without compensation, on a full, regular, part-time, intermittent, or consultant basis, . . ." G.L. c. 268A, § 1(g).

¹⁵See, however, the discussion above regarding Firefighter A and the interpretation of the phrase "permit-granting agency."